



BOARD OF GOVERNORS  
OF THE  
**FEDERAL RESERVE SYSTEM**  
WASHINGTON, D. C. 20551

SANDRA F. BRAUNSTEIN  
DIRECTOR  
DIVISION OF CONSUMER  
AND COMMUNITY AFFAIRS

June 8, 2010

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW.  
Washington, DC 20554

Re: Reply Comments of the Federal Reserve Board staff  
CG Docket Number 02-278; FCC 10-18  
Telephone Consumer Protection Act (TCPA)

Dear Ms. Dortch:

I am writing to provide the reply comments of Federal Reserve Board (Board) staff on the Federal Communications Commission's (FCC) proposed amendments to the FCC's rules under the Telephone Consumer Protection Act (TCPA).<sup>1</sup> The FCC's proposed amendments seek to harmonize its rules under the TCPA with the Federal Trade Commission's (FTC) recently amended Telemarketing Sales Rule. The Board has not taken any position on the proposal. The attached comments represent the Board staff's views with respect to key issues raised by the rulemaking that impact how financial institutions may contact their consumer-customers regarding potential fraud or identity theft and otherwise comply with financial services laws administered by the Board.

Board staff supports the FCC's efforts to protect consumers against unsolicited telemarketing calls by ensuring that consumers do not receive such calls unless they first provide affirmative consent. We also support the FCC's efforts to reconcile differences between the FTC's telemarketing rules and the FCC's rules under the TCPA in order to reduce potential consumer and industry confusion.

However, as discussed below, Board staff is concerned that the proposal's broad requirement to obtain a consumer's written "prior express consent," before any autodialed and/or prerecorded calls may be made to the consumer's wireless or cellular phone may have unintended consequences. Specifically, the proposal, if adopted without revision, would restrict a financial institution's ability to contact the consumer in circumstances which may benefit the consumer, such as to prevent fraud or identity theft or to comply with other legal requirements.

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<sup>1</sup> 75 FR 13471 (March 22, 2010).

## Background

The FTC has authority under the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act) to adopt rules prohibiting deceptive and abusive telemarketing acts or practice. These provisions are implemented in the FTC's Telemarketing Sales Rule. Banks, federal credit unions, and thrifts, among others, are exempt from the FTC's Telemarketing Sales Rule. Instead, such entities are subject to the jurisdiction of the FCC, and must comply with the FCC's rules under the TCPA. Under the Do-Not-Call Implementation Act of 2003, the FTC and FCC were directed to "maximize consistency" between their rules.

In August 2008, the FTC amended the Telemarketing Sales Rule to prohibit sellers and telemarketers from initiating any outbound telephone call using a prerecorded message, or "robocall," unless the seller or telemarketer obtains a consumer's express written agreement to receive such calls. Specifically, the Telemarketing Sales Rule makes it an abusive telemarketing act or practice for a seller to place a robocall for telemarketing purposes unless the seller has obtained a signed, written agreement from the consumer to receive prerecorded calls by or on behalf of the seller at a telephone number designated by the consumer. Moreover, the written agreement may not be required as a condition of purchasing any good or service. In addition, the FTC eliminated an existing exception under the Telemarketing Sales Rule which had permitted calls using prerecorded messages if there was an established business relationship between the caller and the consumer.

Section 227 of the TCPA imposes two separate prohibitions that apply to the use of the telephone network for unsolicited advertising by telephone and facsimile. Both prohibitions are implemented under the FCC's TCPA rules in 47 CFR § 64.1200. First, with respect to calls made to residential phone lines, Section 227(b)(1)(B) of the TCPA prohibits the delivery of artificial or prerecorded voice messages, absent an emergency, without the "prior express consent" of the called party. Unlike the Telemarketing Act, the scope of the TCPA's prohibition applies broadly to all artificial or prerecorded voice messages and is not limited to telemarketing-related robocalls. The FCC has adopted additional exceptions to the general "prior express consent" requirement that apply, for example, if the call is not made for a commercial purpose, or if the call is made to any person with whom the caller has an established business relationship at the time the call is made.<sup>2</sup>

Second, Section 227(b)(1)(A) of the TCPA prohibits additional categories of automated calls absent an emergency or the "prior express consent" of the called party. Significantly, this provision prohibits the use of automated telephone dialing systems or prerecorded messages for calls to cellular or wireless telephone numbers. In contrast to the provisions applying to calls made to residential phone lines, there are no exceptions to the requirement to obtain a consumer's "prior express consent" for these additional categories of additional calls.<sup>3</sup>

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<sup>2</sup> See 47 CFR 64.1200(a)(2).

<sup>3</sup> See 47 CFR 64.1200(a)(1).

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On January 20, 2010, the FCC issued a proposal under the TCPA soliciting comment on whether to adopt a similar written prior express consent requirement as adopted by the FTC under the Telemarketing Sales Rule.<sup>4</sup> The proposal would also eliminate the established business relationship exception to the prior express consent requirement with respect to calls made to residential phone lines. Finally, the FCC solicited comment on whether it should adopt the identical prior express consent requirement for calls governed by Section 227(b)(1)(A) of the TCPA as for calls governed by Section 227(b)(1)(B) of the TCPA. In particular, the FCC concluded that “[b]ecause the two provisions include an identically worded exception for calls made with the ‘prior express consent of the called party,’ ... any written consent requirement adopted by the Commission should apply to both provisions.”

### **Board Staff’s Comments on the Proposed Rule**

Board staff supports the FCC’s proposal to enhance the protections provided to consumers with respect to telemarketing. Specifically, Board staff supports the proposed requirement to obtain a consumer’s written prior express consent before prerecorded calls for telemarketing purposes may be made. Such standards would produce consistency with the FTC’s August 2008 amendments to the Telemarketing Sales Rule and create the same level playing field for a telemarketer’s use of robocalls regardless of whether the entity is subject to the FTC’s rule or the FCC’s rule. Nonetheless, Board staff believes that applying the same requirement to any calls made to cellular phone lines using an automated phone dialing service or artificial or prerecorded voice may have unintended consequences. Specifically, the proposal could adversely impact a financial institution’s ability to contact its customers efficiently and economically for purposes unrelated to telemarketing.

Financial institutions today use autodialed and/or prerecorded calls for many reasons unrelated to telemarketing and in ways that benefit consumers. For instance, financial institutions use autodialers or prerecorded calls or text alerts to warn the consumer of potential fraud or identity theft when unusual patterns of account activity are detected. In addition, financial institutions use autodialers and prerecorded calls to alert consumers when their account balance is low or a payment is due or past due to help consumers avoid the assessment of fees.

Financial institutions also use autodialers or prerecorded calls or text alerts to facilitate compliance with other regulatory requirements. For example, under the information security rules under Section 501(b) of the Gramm-Leach Bliley Act,<sup>5</sup> financial institutions must establish customer notification programs following a security breach or other unauthorized access to customer information. Many institutions use autodialers and prerecorded messages and text alerts in order to contact large numbers of customers quickly, efficiently, and in a cost-effective

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<sup>4</sup> Board staff understands that today most financial institutions treat a consumer’s provision of a cell phone number as reasonable evidence of the consumer’s prior express consent to be contacted at that number. See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for a Declaratory Ruling, 23 FCC Rcd 559, 563 (January 2008).

<sup>5</sup> See 15 U.S.C. 6801(b). See also 12 CFR Part 208, Appendix D-2.

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manner. Similarly, financial institutions use autodialers and prerecorded messages and text alerts to provide notices of address discrepancies as required by Section 605(h) of the Fair Credit Reporting Act.<sup>6</sup>

Board staff understands that over one-fifth of all households today use wireless or cellular telephone services as their sole or primary means of contact.<sup>7</sup> Thus, a rule that imposes specific requirements for obtaining a consumer's written prior express consent could potentially adversely impact a significant number of consumers who may not have consented to receive calls from their financial institution at their wireless or cell phone number in the manner proposed by the FCC. Similar difficulties with respect to obtaining a consumer's written prior express consent may apply to calls made to residential phone lines. However, Board staff notes that an existing exception for messages made for non-commercial purposes may apply to such calls.<sup>8</sup> No similar exception applies for calls made to wireless or cellular telephone numbers under the proposal.<sup>9</sup>

Board staff further notes that the FTC's amendments to the Telemarketing Sales Rule are limited to outbound telephone calls that deliver a prerecorded message. By contrast, the FCC's proposal would apply the written "prior express consent" requirement to all cellular or wireless phone calls and is not limited to calls made using artificial or prerecorded messages. Specifically, the FCC's rule also would apply to any calls made using an "automatic telephone dialing system." Under the TCPA rules, an automatic telephone dialing system is defined as "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."<sup>10</sup> Thus, even if a financial institution uses an autodialer to call certain telephone numbers that are predetermined by the institution (and not randomly generated by the autodialer), the proposed requirement to obtain a consumer's written prior express consent would presumably still apply. This is true even if the consumer speaks to a live representative after the telephone number was dialed. If these requirements are adopted, financial institutions that have not obtained a consumer's prior express consent in writing would have to use live representatives to manually place calls, which could inhibit an institution's ability to reach consumers in certain circumstances where a consumer might need the information as soon as possible (for example, in cases of suspected fraud or identity theft). Moreover, this could significantly increase costs for the institution and such costs would likely be passed on to consumers without corresponding consumer benefit.

Board staff recognizes that the identical use of the term "prior express consent of the called party" under both Sections 227(b)(1)(A) and (B) of the TCPA presents certain challenges

<sup>6</sup> See 15 U.S.C. 1681c(h). See also 12 CFR § 222.91.

<sup>7</sup> See U.S. Department of Health and Human Services, National Health Interview Survey (December 2009).

<sup>8</sup> See 47 CFR § 64.1200(c)(2).

<sup>9</sup> Board staff also notes that in some cases, a financial institution may not know whether a consumer has provided a residential or cellular phone number and therefore would be unaware whether the provisions of 47 CFR § 64.1200(a)(1) or (2) apply to telephone communications with that consumer.

<sup>10</sup> See 47 CFR § 64.1200(f).

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insofar as differentiating between the specific prior express consent requirements that should apply to calls to residential telephone lines and to calls made to cellular or wireless telephone numbers. Nonetheless, in light of the risks discussed above, Board staff urges the FCC to consider exercising its rule writing authority to the extent feasible to exempt calls made for non-telemarketing purposes to cellular or wireless telephone numbers from the requirements to obtain a consumer's written prior express consent.<sup>11</sup>

We would be pleased to provide any assistance that the FCC may require in developing a final rule that ensures consumers are not subjected to unsolicited and unwanted telemarketing calls, but that does not unduly restrict financial institutions' ability to contact consumers quickly and efficiently in other circumstances that may benefit the consumer. To discuss these matters further, please contact Leonard Chanin, Deputy Director, Division of Consumer and Community Affairs, or David Stein, Managing Counsel for Regulations, Deposit Accounts/ Credit Reporting Section, at (202) 452-3667.

Thank you for this opportunity to comment on the FCC's proposal.

Sincerely,

A handwritten signature in dark ink, appearing to read "Sandra A. Brown", with a long horizontal flourish extending to the right.

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<sup>11</sup> See, e.g., TCPA Section 227(a)(2).

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bcc: Ky Tran-Trong  
Leonard Chanin  
Sandy Braunstein  
David Stein